Nos. 94-7449 and 94-7466

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In the Supreme Court of the United States

OCTOBER TERM, 1995

RONALD J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

CANDESSA S. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether evidence that the defendant placed a firearm near to drugs or drug proceeds to provide protection or security and that the firearm was accessible to the defendant during the commission of a drug trafficking offense is sufficient to support a conviction for using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-7448

RONALD J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 94-7492

CANDISHA S. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (J.A. 78-119) is reported at 36 F.3d 106. The opinion of the panel in 94-7448 (J.A. 17-32) is reported at 995 F.2d 1113. The opinion of the panel in 94-7492 (J.A. 47-77) is reported at 997 F.2d 884. The opinion of the district court in 94-7492 (J.A. 38-46) is reported at 779 F. Supp. 606.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 4, 1994. The petition for a writ of certiorari in No. 94-7448 was filed on December 28, 1994. The petition for a writ of certiorari in No. 94-7492 was filed on December 29, 1994. The petitions for certiorari were granted and the cases were consolidated on April 17, 1995. J.A. 34, 120. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. 924(c)(1) is reprinted in pertinent part in an appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner Bailey was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g); and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). He was sentenced to 51 months' imprisonment on the cocaine possession charge, a concurrent 51-month prison term on the felon in possession charge, and a consecutive 60-month prison term on the using or carrying a firearm charge. J.A. 19.

Following a jury trial in the United States District Court for the District of Columbia, petitioner Robinson was convicted of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1); possession of cocaine with intent to distribute it, in violation of the same statute; commission of narcotics offenses within 1000 feet of a school, in violation of 21 U.S.C. 860(a); maintenance of a building for the purpose of manufacturing, storing, distributing, or using cocaine base, in violation of 21 U.S.C. 856(a); and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). She was sentenced to concurrent 97-month terms of imprisonment on the narcotics counts and a consecutive 60-month prison term on the using or carrying a firearm count. J.A. 38, 82.

1. a. In May 1988, petitioner Bailey was stopped by two District of Columbia Metropolitan Police Officers when they noticed that he was driving a car that lacked a license plate and inspection stickers. When Bailey, who failed to produce a driver's license, complied with the officers' instructions to get out of his car, they observed him attempt to conceal an item between the seat and front console. When one of the officers moved the driver's seat back, a white plastic packet of cocaine and a brown leather pouch fell from between the seat and console to the floor of the car. The pouch contained 26 additional packets of cocaine. The officers also discovered a single round of live .380 caliber ammunition on the console of the car. J.A. 3-4, 18; *Bailey* Feb. 27 Tr. 59-65. Approximately $700 was recovered from petitioner Bailey's person. Feb. 27 Tr. 97-98. It turned out that the car belonged to Bailey, who had purchased it about two weeks earlier. Feb. 28 Tr. 7-11.

After arresting Bailey, the officers searched the trunk of the car. Among several bags of clothing, they discovered a loaded nine millimeter Smith and Wesson pistol and about $2,500 in currency concealed in a vest jacket. J.A. 5-7, 18; *Bailey* Feb. 27 Tr. 92-96, 97, 135.

b. At trial, an experienced narcotics detective testified that the cocaine found in Bailey's car was packaged for sale in $50 bags. He also testified that drug dealers frequently "use the[ir] weapons not only to protect themselves, but [also] to protect their assets, drugs and money" from "stickup men," who "know [the dealers] have two things—drugs and money." J.A. 10. Finally, he explained that "weapons are used for enforcement purposes. They are also used to protect [a drug dealer's] turf. Drug

dealers get very territorial. They like to protect the areas they deal from. They will use the weapon to protect their areas." J.A. 10. See also *Bailey* Feb. 27 Tr. 157, 160.

Bailey was convicted, *inter alia*, of possession of cocaine with intent to distribute it, in violation of 18 U.S.C. 841(a)(1), and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1).

c. A divided panel of the court of appeals affirmed, rejecting Bailey's claim that the evidence was insufficient to support his conviction under Section 924(c)(1). The court held that Bailey could be convicted for "us[ing] a firearm 'during and in relation to [a] * * * drug trafficking crime' " if the jury could reasonably infer that "the gun facilitated [Bailey's] commission of a drug trafficking offense." J.A. 21. The court explained that "[t]he trier of fact could reasonably infer that the money [in the trunk] was the proceeds of several already-completed drug transactions," J.A. 23, and that the gun in the trunk "had the purpose of protecting the cash in the trunk, and only slightly less obviously, had the purpose of protecting the drugs and money on Bailey's person," J.A. 27.

Judge Ginsburg dissented. J.A. 29-32. He stated that, if prior circuit precedent were not binding, he would "gladly join the majority in upholding the § 924(c) conviction." J.A. 32. But in his view, prior circuit precedent required reversal of Bailey's conviction. J.A. 30, 32.

2. a. On July 15, 1991, undercover officer Larry Hale of the District of Columbia Metropolitan Police Department approached petitioner Robinson's sister, Veloria, and said that he wished to purchase a quantity of crack cocaine. Veloria took the officer to a Northeast Washington apartment and knocked at the door. Petitioner Robinson responded to the knock and asked the undercover officer what he wanted. Officer Hale said he wanted a "20." He then observed Robinson retrieve a

rock of crack cocaine from the apartment's bedroom, which she sold him for $20 in marked money. J.A. 48; 1 *Robinson* Tr. 7.

The following evening, Officer Hale returned to petitioner Robinson's apartment and purchased cocaine from Kwarme Parker, who said that he lived in the apartment with her. J.A. 48-49; 1 *Robinson* Tr. 8-10. A half hour later, the police executed a search warrant at the apartment. Inside a locked trunk in a bedroom closet, the police found a .22 caliber pistol and holster, a tax return signed by Robinson, a letter from Robinson's employer, two plastic baggies containing cocaine, the $20 in marked money that the officer had given Robinson on the previous day, and $42.80 in other cash. Other documents in other parts of the bedroom, including a lease, confirmed that Robinson lived in the apartment. J.A. 49; 1 *Robinson* Tr. 35-39, 44.

b. At Robinson's trial, a narcotics detective testified that the cocaine in the locked trunk had a street value of $700 to $800 in its present form, or a $1,400 value if divided into $20 pieces. He explained that cocaine dealers use firearms to protect their enterprise from "stickup boys" who might attempt to rob them following a sale. In addition, they arm themselves to protect their turf from other drug gangs, lower level employees bent upon taking over a drug trafficking operation, or the police, should they try to close down the operation. The detective also testified that the .22 Derringer pistol found in petitioner Robinson's trunk was commonly known as a "second gun" that a drug dealer would hide on his person for use until he could reach his "real" gun, which would likely have greater firepower. J.A. 48, 81; 1 *Robinson* Tr. 77-79.

Testifying in her own behalf, Robinson acknowledged that she had leased the apartment and owned the trunk in which the narcotics and pistol were found. Although she also admitted that she knew that Parker was selling drugs, she disclaimed knowledge of the drugs or the pistol

found in her footlocker. J.A. 50. She also denied that she had been present in the apartment on the evening of July 15, when the first drug sale had taken place. 2 *Robinson* Tr. 129-130.

The district court denied Robinson's motion for a judgment of acquittal on the "uses or carries" count, ruling that the evidence was sufficient to establish a violation of Section 924(c)(1). J.A. 46. The court reasoned that the fact that Robinson's apartment "was a base for the distribution of crack cocaine permits the inference that the gun was used to facilitate the possession with intent to distribute." J.A. 45. In the district court's view, because "the jury could legitimately infer that [Robinson] had access to the gun in the trunk, and could use the gun to protect the stash of drugs and the proceeds of drug sales should the need arise," it did not matter that the trunk was kept locked. J.A. 45-46. The jury convicted Robinson of violating Section 924(c)(1). J.A. 82.

c. A divided panel of the court of appeals reversed Robinson's conviction on the Section 924(c) count. J.A. 47-61. The court determined that Robinson's "possession of this single, unloaded .22-caliber derringer found in a locked trunk in a bedroom closet falls significantly short of the type of evidence we have held to establish actual use under the statute." J.A. 55-56. In the court's view, "mere proximity of a gun to drugs is not * * * sufficient to support a conviction under section 924(c) in this circuit." J.A. 59-60.

Judge Henderson dissented. J.A. 61. In her view, the firearm facilitated Robinson's distribution of narcotics because it protected both her and the drugs during sale transactions. J.A. 70-71. In any event, she believed that the jury could reasonably find that the gun concealed in the apartment was used during and in relation to the ongoing offense of maintaining premises for the distribution of drugs. J.A. 72-74.

3. a. On rehearing en banc, the court of appeals affirmed the Section 924(c) convictions in both cases. J.A. 78-119. The majority rejected the multi-factor weighing approach previously employed by the circuit for determining the sufficiency of the evidence to support a Section 924(c)(1) conviction. The court noted that the prior approach improperly "invite[d]" the reviewing court to become "a second jury weighing the evidence anew and deciding whether or not we would vote to convict the defendant." J.A. 87. It also "produced widely divergent and seemingly contradictory results," J.A. 88, because it did not "yield[] determinate results in any but the easiest of cases," J.A. 89. Finally, the court stated that its prior approach conflicted with the approach followed by the other regional courts of appeals, which "have each adopted a definition of 'use' that is considerably broader than firing, displaying, or otherwise brandishing the firearm," J.A. 89-90, and each of which "focuses, in essence, upon whether the firearm was accessible and proximate to the defendant during the commission of the drug offense," J.A. 90.

In reformulating the test for sufficiency, the court stated that Section 924(c)(1) requires two showings: that the defendant "use[d]" the firearm and that the use was "during and in relation to a drug trafficking crime." The court rejected the view that "use" includes only "the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense." J.A. 93. The court held that "one uses a gun, i.e., avails oneself of a gun, whenever * * * one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime." J.A. 95. Since "possession with the intent to distribute is a continuing offense," the court held that "the government need only prove that the defendant put or kept the gun in that place at some point while the defendant illegally possessed the drugs." J.A. 95.

Second, the court clarified the requirement that the use of the gun had to be "in relation to a drug trafficking crime." The court found that this element is satisfied if the defendant "use[s] a gun to protect one's drugs, drug paraphernalia, or the proceeds of one's drug sales." J.A. 96.[1] Therefore, the court held, "positioning a firearm in such a way that it protects or is otherwise integrated into one's drug trafficking is not just a use of that gun, but is a use of that gun in relation to a drug trafficking offense." J.A. 98. The court concluded that there is sufficient evidence for a jury to find that the defendant has so positioned the firearm if "at some time during the commission of the predicate drug offense," the defendant "put or kept a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking (*e.g.*, a place used to store, manufacture, or distribute drugs, or to keep the proceeds of drug transactions)." J.A. 98. In such cases, the court concluded, the "jury may infer that the gun was being used to protect the drug trafficking operation, and was therefore being used in violation of § 924(c)(1)." J.A. 98.

Applying that standard, the court determined that in each case, the gun was sufficiently proximate to the drugs or narcotics proceeds and was accessible when the drugs or proceeds were being handled. The court held that the jury could therefore properly infer in each case that the defendant had placed the gun in that location in order to further the drug offenses or to protect the possession of the drugs, and that the gun had therefore been used "in relation to" a drug trafficking offense. J.A. 100-101.

b. Judge Wald filed a dissenting opinion. In her view, the court's previous multifactor test—requiring consideration of "the type of weapon involved, whether it was loaded, the presence of expert testimony to support the

[1] Apparently due to a printer's error, the Joint Appendix omits the words "drug paraphernalia, or the proceeds of one's" from the above quotation. See 36 F.3d at 115.

government's theory of 'use,' the proximity of the gun to the drugs, and the accessibility of the gun to the defendant," J.A. 102—provided a satisfactory standard for appellate review of Section 924(c)(1) convictions. J.A. 102-103. She stated that "[w]here evidence of ready access to a gun by the defendant guarding or distributing the drugs exists," the jury can infer "that such access is an intrinsic part of the criminal drug trafficking act." J.A. 105. But, under her view, the evidence would be insufficient to sustain a conviction for using a firearm where the defendant himself, at the time of his arrest, lacks ready access to the firearm. J.A. 106. Judge Wald concluded that there was sufficient evidence to sustain Bailey's conviction because his gun was accessible to him at the time he was arrested but insufficient evidence to sustain Robinson's conviction because "there was proof only of drugs and an unloaded gun in a locked trunk in a bedroom closet." *Ibid.*

Judge Williams, joined by Judges Silberman and Buckley, also dissented. Judge Williams disagreed with the position—which he conceded had been adopted by "all" of the regional courts of appeals—that a defendant can be convicted of violating Section 924(c)(1) "without evidence of the defendant's firing, brandishing, displaying or actively using the firearm in any way." J.A. 107. In his view, the term "uses" connotes "actual service from the weapon in completing an unlawful act," such as by firing it, intimidating opponents, displaying or brandishing it, or using it as an item of exchange. J.A. 110. Under that view, the term "uses" does not embrace the defendant's conduct in placing the gun near the drugs or proceeds to embolden the defendant or to protect his criminal activity, because that is not "active employment" of the gun. J.A. 116. Applying his view of the statute, Judge Williams would have reversed the convictions of both Bailey and Robinson. J.A. 119. Judge Silberman filed a brief separate dissent. J.A. 119.

SUMMARY OF ARGUMENT

Section 924(c)(1) is violated when a defendant "uses" a firearm "during and in relation to any * * * drug trafficking crime." Under the ordinary meaning of the term "use," which governs the construction of Section 924(c), a person "uses" an object when he avails himself of it or employs it to facilitate a goal he has in mind. Thus, a defendant who places a gun and drugs or proceeds in proximity to each other, to protect the drugs or drug proceeds and to embolden himself to commit a drug crime, has "used" the gun "during and in relation to" a drug trafficking offense. That construction of Section 924(c)(1) follows directly from the statute's plain language; it is the only construction that is consistent with this Court's reasoning in *Smith* v. *United States*, 113 S. Ct. 2050 (1993); and it has been accepted by every regional court of appeals.

Petitioners propose to limit the scope of the statutory term "use" to proscribe only what they call "active" uses of a weapon. Neither the statutory language, legislative history, nor past judicial construction, however, support any such limitation on the unqualified text of Section 924(c)(1). Congress did not say "active" use, and there is no basis for engrafting that limitation into the statute. In any event, the proposed addition of the adjective "active" to the term "use" does not assist petitioners: they certainly engaged in an "active" use when they strategically placed firearms near drugs and the proceeds of drug transactions to facilitate their drug dealing operations.

Since the placement of a weapon in such a way as to protect drugs and drug proceeds is a "use" of the weapon "in relation to" a drug trafficking crime, a conviction under Section 924(c)(1) must be sustained if a reasonable jury could find that the defendant engaged in that conduct. The court of appeals correctly held that a jury may reasonably draw that inference when the evidence

shows that the weapon was found proximate to the drugs or proceeds and accessible to the defendant when he was dealing with the drugs or proceeds. Of course, the jury need not draw that inference. But where evidence of proximity and accessibility exists, it is sufficient to support the inference, and the role of the reviewing court is at an end. Because the evidence in this case meets that standard, the Section 924(c)(1) convictions should be affirmed.

ARGUMENT

I. THE USE OF A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING OFFENSE INCLUDES ITS EMPLOYMENT FOR PROTECTION OR SECURITY

A. The Language And Structure Of 18 U.S.C. 924(c) Embrace The Use Of A Firearm For The Purpose Of Safeguarding Or Otherwise Facilitating A Drug Trafficking Venture

Section 924(c)(1) provides that it is an offense to "use[]" a firearm "during and in relation to any * * * drug trafficking crime." Petitioners acknowledge that "firing, discharging, aiming, pointing, bludgeoning, trading, threatening with or brandishing, or displaying" a gun are all "uses" that the statute prohibits. Pet. Br. 11. But "use[]" in Section 924(c) is not confined to those actions; it is not a term of art that denotes a limited number of ways to employ a firearm to facilitate or advance a drug transaction. Rather, it is a general term, not defined in the statute, that must be given the full sweep of its "ordinary or natural meaning." *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993) ("use[]" in Section 924(c)(1) includes use for barter as well as the more conventional use of a firearm, *i.e.*, as a weapon); see *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).[2]

[2] The majority's holding in the court of appeals addresses the "uses" rather than the "carries" prong of Section 924(c)(1), and

The natural meaning of the term "use" includes a broad range of functions, including employment of a weapon for protection or security in the event it is needed. Every authoritative standard dictionary recognizes the breadth of the term "use." For example, in construing the same statute in *Smith* v. *United States*, this Court observed that "Webster's defines 'to use' as '[t]o convert to one's service' or 'to employ.'" 113 S. Ct. at 2054. A later edition of the same dictionary cited in *Smith* defines the verb "use" also to mean "to carry out a purpose or action by means of: make instrumental to an end or process: apply to advantage: turn to account." *Webster's Third New International Dictionary, Unabridged* 2524 (1986). Random House defines the term to mean "to employ for some purpose; put into service; make use of; to avail oneself of; apply to one's own purposes." *The Random House Dictionary of the English Language* 2097 (2d ed. unabridged 1987). See also *United States* v. *Rutherford*, 54 F.3d 370, 372 (7th Cir. 1995) ("use is defined as '[t]he act of employing a thing for any (esp. a profitable) purpose'"; quoting 19 *The Oxford English Dictionary* 350 (2d ed. 1989)). And, as the Court pointed out in *Smith*, see 113 S. Ct. at 2054, Black's Law Dictionary similarly defines "use" as "to make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." *Black's Law Dictionary* 1541 (6th ed. 1990).

All of those definitions share the idea of employing an object to serve a particular function or purpose.[3] A

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the questions presented in the petitions for certiorari challenge that holding. We therefore confine our discussion to that issue.

[3] In a variety of circumstances, courts have long recognized that the "common meaning" of use is to "employ for the accomplishment of a purpose," *In re Fleshman's Estate*, 5 P.2d 727, 728 (Idaho 1931), or "to employ for any purpose," *Atlantic Nat'l Bank* v. *St. Louis Union Trust Co.*, 211 S.W.2d 2, 6 (Mo. 1948). See, *e.g.*, *Foote Mineral Co.* v. *Maryland Casualty Co.*, 173 F. Supp. 925, 929 (E.D. Tenn. 1959) ("[a]ct of employing anything"), aff'd, 277 F.2d 452 (6th Cir.), cert. denied, 364 U.S. 818 (1960); *Alexander* v. *Alexander*, 561 S.W.2d 59, 65 (Ark. 1978) (to "enjoy, hold, occupy, or have in some manner the benefit of"); *Whitaker* v. *Regents of the Univ. of Calif.*, 178 P. 308, 310 (Cal. Ct. App. 1918) ("to avail one's self of"); *Esfeld Trucking, Inc.* v. *Metropolitan Ins. Co.*, 392 P.2d 107, 110 (Kan. 1964) ("as a verb, [use] has a well-understood * * * legal significance, having been variously defined as * * * to avail one's self of, * * * hold, occupy, enjoy, or take the benefit of"); *Woodrich Construction Co.* v. *Indemnity Ins. Co.*, 89 N.W.2d 412, 418 (Minn. 1958) ("to avail one's self of"); *General Agric. Corp.* v. *Moore*, 534 P.2d 859, 863 (Mont. 1975) (refusing to limit constitutional provision regarding "existing right to use" surplus waters to "perfected or actual 'use'"); *State* v. *Place*, 582 A.2d 616, 618 (N.H. 1990) ("use" of lights includes defendant's "avail[ing] himself of their benefit"); *Beach* v. *Livingston*, 149 S.E.2d 328, 330 (S.C. 1966) ("to employ for any purpose, to employ for attainment of some purpose or end, * * * to put to one's use or benefit"); *State* v. *Douglas*, 16 N.W.2d 489, 494 (S.D. 1944) ("to avail one's self of, to employ, to put to a purpose").

defendant who avails himself of a gun to provide security for possession or distribution of drugs satisfies each of those definitions. As the court of appeals recognized, one important and long recognized use of a gun is to provide protection and security to the user. For example, "a gun placed in a drawer beside one's bed for fear of an intruder would, in common parlance, be a gun 'used' for domestic protection." J.A. 93-94. The fact that no intruder in fact appeared—or, to make the analogy to this case more precise, the fact that no intruder has been *shown* to have appeared—does not retroactively alter the fact that the individual has made use of the gun. Placing the gun in the drawer may provide the user with protection and security, and it may permit the user to sleep more soundly than otherwise, regardless of whether the user has any further need to handle, aim, or discharge the weapon.

In much the same way, a defendant may place a firearm near his drugs or drug proceeds, where it is accessible to him when he is handling the drugs or proceeds,

in order to protect them and to embolden himself to commit a drug trafficking offense. That action constitutes a "use" of the firearm in the ordinary sense. The defendant may have no need to use the firearm further to threaten or shoot at policemen, rival dealers, or dissatisfied customers. That, however, does not imply that the gun is not being "use[d]" to provide security for his commission of a drug trafficking offense. Section 924(c)(1) prohibits a variety of different uses, and only one use is required to support the statute's application.

B. This Court's Decision In *Smith* v. *United States* Also Refutes Petitioners' Narrow Theory Of The Meaning Of "Use"

This Court's decision in *Smith* v. *United States*, 113 S. Ct. 2050 (1993), makes clear that, contrary to petitioners' contention, the term "use" in Section 924(c)(1) should be given its full and ordinary meaning. The issue in *Smith* was whether a defendant who exchanged a gun for narcotics had "used" the gun under Section 924(c)(1). The Court explained that "Section 924(c)(1)'s language sweeps broadly, punishing any "us[e] of a firearm, so long as the use is 'during and in relation to' a drug trafficking offense." 113 S. Ct. at 2054. Accordingly, the Court "decline[d] to introduce [the] additional requirement" concerning the term "use" that the defendant urged, and held that the use of a gun in exchange for drugs violated the statute. *Ibid.*

The teaching of *Smith* is that the term "use" in Section 924(c) is a general term, and that it is not limited to a few, paradigmatic uses of a firearm, such as discharging, pointing, or brandishing. Instead, the term encompasses all instances in which a firearm is employed to facilitate a covered drug trafficking offense. In light of that principle, it follows *a fortiori* that when a defendant places a gun near drugs or proceeds to provide security

for the commission of a drug trafficking crime, he has "used" the gun within the meaning of the statute. Indeed, the Court in *Smith* reinforced that point in two ways of particular relevance here.

First, the Court in *Smith* recognized that it was not writing on a clean slate, and that the term "use" had long received a broad judicial construction. Thus, the Court cited *Astor* v. *Merritt*, 111 U.S. 202 (1884), for the proposition that "use" means " 'to employ' or 'to derive service from.' " See *Smith*, 113 S. Ct. at 2054. *Astor* itself involved a customs statute exempting from duty "wearing apparel in actual use," and this Court held that "unworn wearing apparel, purchased [by an individual for his use or that of his family] for an approaching season," was "in actual use." 111 U.S. at 203. The fact that the apparel had not actually been worn was not dispositive. As the Court in *Astor* explained:

> [a] article of wearing apparel * * * [that is] placed in with, and as a part of, what is called a person's wardrobe, is, in common parlance, in use, in actual use, in present use, in real use, as well before it is worn as while it is being worn or afterwards.

Id. at 214. The same principle applies to firearms "placed in with, and as a part of" a defendant's drugs or proceeds.

Second, the Court in *Smith* explained that "§ 924(c)(1)'s language sweeps broadly," and it cited with approval (see 113 S. Ct. at 2054) the opinion of the D.C. Circuit in *United States* v. *Long*, 905 F.2d 1572 (Thomas, J.), cert. denied, 498 U.S. 948 (1990). The D.C. Circuit in that case observed that "the word 'use' is expansive," *id.* at 1577, and that "a defendant can 'use' a firearm without actively employing it," *id.* at 1576. That position squarely rejects petitioners' theory that the term "use" in the statute refers only to a subset of what would ordinarily be considered uses, and it directly contradicts petitioners' contention that "[u]se

under Section 924(c) means the *active employment* of a firearm." Pet. Br. 11 (emphasis added).

C. The Regional Courts of Appeals Have Held That Employment Of A Firearm To Provide Security For A Drug Trafficking Offense Is A Use Prohibited By Section 924(c)

The experience of the regional courts of appeals confirms that, even if a firearm is concealed or out of the drug dealer's reach, its strategic placement to protect a drug operation and to embolden a defendant is a "use" prohibited by Section 924(c)(1).[4] A leading case is *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.). In that case, the Ninth Circuit noted that "the evident purpose of the statute was to impose more severe sanctions where firearms facilitated, or had the potential of facilitating, the commission of a felony." *Id.* at 540. The court explained:

> If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge in fact occurred, then there is a violation of the statute.

Ibid. Accord *United States* v. *Torres-Rodriguez*, 930 F.2d 1375, 1385 (9th Cir. 1991); *United States* v. *Mason*, 658 F.2d 1263, 1270-1271 (9th Cir. 1981) (Kennedy, J.). As the First Circuit stated, "the question is whether

[4] Even the principal dissenting opinion below recognized that "all" of the courts of appeals affirm convictions under Section 924(c)(1) without proof of what the dissenting judge termed "actively using the firearm in any way." J.A. 107. The majority agreed. See J.A. 90-92.

placement of the weapon was designed to facilitate the narcotics enterprise, by, say, protecting against untoward contingencies or safeguarding the cache of drugs. * * * Indeed, so long as one purpose in situating the weapon nearby was to protect the narcotics enterprise, that need not have been defendant's sole purpose." *United States* v. *Hadfield*, 918 F.2d 987, 998 (1st Cir. 1990), cert. denied, 500 U.S. 936 (1991).[5]

[5] Accord *United States* v. *Fermin*, 32 F.3d 674, 678 (2d Cir. 1994) ("This Circuit will sustain a section 924(c) conviction if the evidence shows that the defendant strategically placed a weapon so as to enable ready access to it during a drug transaction."), cert. denied, 115 S. Ct. 1145 (1995); *United States* v. *Theodoropoulos*, 866 F.2d 587, 596-597 (3d Cir. 1989) ("presence in plain view of a loaded firearm * * * is evidence that the conspirators may have felt some need for security from which a jury could infer that the weapon was an integral part of the conspiracy and was 'used' therein"); *United States* v. *Paz*, 927 F.2d 176, 179 (4th Cir. 1991) ("it is enough if the firearm is present for protection and to facilitate the likelihood of success"); *United States* v. *Pace*, 10 F.3d 1106, 1121 (5th Cir. 1993) (Section 924(c) requires proof that the firearm "facilitated" the drug trafficking offense, and "the concepts encompassed by the word 'facilitate' include[] availability to provide protection"), cert. denied, 114 S. Ct. 2180 (1994); *United States* v. *Wilson*, 27 F.3d 1126, 1132 (6th Cir.) (evidence sufficient "if the possessor of a weapon intended to have it available for possible use during or immediately following the transaction by lending courage to the possessor"), cert. denied, 115 S. Ct. 452 (1994); *United States* v. *Vasquez*, 909 F.2d 235, 240 (7th Cir. 1990) ("The trier of fact could reasonably conclude that the availability of firearms instilled [the defendant] with a heightened sense of security while he possessed the drugs with the intent to distribute them."), cert. denied, 501 U.S. 1217 (1991); *United States* v. *Matra*, 841 F.2d 837, 842 (8th Cir. 1988) ("Just as weapons are kept at the ready to protect military installations against potential enemy attack, so too may weapons be kept at the ready to protect a drug house, thereby safeguarding and facilitating illegal transactions."); *United States* v. *McKinnell*, 888 F.2d 669, 675 (10th Cir. 1989) ("use" element satisfied if "the firearm formed an integral part of [the defendant's] criminal undertaking by providing a means of protecting his operation and intimidating those encountered in the course of drug transactions"); *United*

Even when courts of appeals have found, in particular cases, that the jury could not reasonably infer that a firearm was used to protect a drug operation and to embolden a defendant, they have expressed the understanding that "use" includes placement of a weapon for the purpose of protecting drugs or proceeds. For example, the Second Circuit in *United States* v. *Feliz-Cordero*, 859 F.2d 250 (2d Cir. 1988), reversed a conviction of a defendant whose gun was found in the bedroom dresser drawer of an apartment that elsewhere contained drug paraphernalia. The court nonetheless recognized that a firearm that "was strategically located so as to be quickly and easily available for use during [a drug] transaction" would "come within the 'uses' provision of section 924(c)." 859 F.2d at 254. Compare *United States* v. *McFadden*, 13 F.3d 463, 468 (1st Cir. 1994) (Breyer, J., dissenting) (discussing use of "the guns *for protection* of the drugs, thereby 'facilitat[ing]' the drug crime").

II. PETITIONERS' THEORY OF "ACTIVE" USE IS INTERNALLY INCONSISTENT AND IS NOT SUPPORTED BY THE STRUCTURE OF THE STATUTE OR ITS LEGISLATIVE HISTORY

A. Section 924(c) Is Not Limited To "Active" Uses

Petitioners repeatedly argue that Section 924(c) penalizes only those who "*actively* employ a firearm to carry out the predicate offense." Pet. Br. 13 (emphasis added); see also, *e.g.*, *id.* at 11 ("active employment of a firearm"), 14 ("active employment"), 15 ("definitions suggest action or activity," "active employment"), 16 ("active employment"), 17 ("actively employed"), 19 ("[*a*]*ctive* employment"). They then argue that such employment

States v. *Poole*, 878 F.2d 1389, 1393 (11th Cir. 1989) ("use" element satisfied because the jury could have concluded that guns found near drugs "were used to protect the [drug traffickers] and the cocaine," even where there was no evidence that the guns were fired, brandished, or displayed).

"includes firing, discharging, aiming, pointing, bludgeoning, trading, threatening with or brandishing, or displaying," and that "[i]t may also include referring to the gun." Pet. Br. 11. According to petitioners, "[u]se normally requires that the defendant handle the firearm or be aware of use of the weapon by others involved in the predicate offense." Pet. Br. 11.

The text of Section 924(c)(1) does not include the term "active" or any of its variants. Nor is there any basis for engrafting an "active" requirement onto the clear and unqualified statutory text. Indeed, that is precisely the lesson of *Smith*, where the core of the defendant's argument was that the term "uses" in the statute must be understood to include the further requirement of use "as a weapon." The Court in *Smith*, "decline[d] to introduce that additional requirement." 113 S. Ct. at 2054.

In any event, even if the statute included an additional requirement of "active" use, it would not assist petitioners. Any principled application of that requirement would include the conduct of a defendant who deliberately and "actively" places a firearm proximate to drugs or proceeds. There is nothing "passive" about a defendant's positioning of a gun to make it available to provide security for his drug trafficking crimes, or, for that matter, moving drugs right next to a gun for the same purpose. Both actions create the volatile mixture at which Section 924(c)(1) is aimed: the use of firearms in connection with drug trafficking, with the consequent enhanced risk of violence.

Nor would the result change under petitioners' alternative requirement "that the defendant handle the firearm." Once again, that requirement is not found in the statute itself. Petitioners themselves state only that it is "normally" required, not that it is an essential element of the offense. Pet. Br. 11. Moreover, petitioners also concede that a defendant who "refer[s] to the gun" may violate

the statute "if such action assists in the accomplishment of the offense." Pet. Br. 11. A defendant convicted on that basis may or may not have "handled" the gun. Finally, even if handling the gun were required, a defendant who is using a gun to provide security for his commission of a drug trafficking offense will ordinarily have handled the firearm when placing it proximate to the drugs or drug proceeds.

In short, petitioners are left with a construction of the statute that limits the prohibited uses to conduct that involves discharging a gun, threatening someone with it, or exchanging it for drugs. That construction is inconsistent with the broad and unqualified employment of the term "use" in the statute.

B. The Structure Of Section 924(c)(1) And Related Provisions Provides No Support For Petitioners' Argument

Petitioners argue (Pet. Br. 15-21) that the statute must be interpreted as they urge, because the structure of Section 924(c)(1) and its surrounding provisions requires that construction. A close examination of the statute, however, undermines that contention.

At the outset, petitioners' construction would defeat one of Section 924(c)(1)'s key applications. If the term "uses" were confined to acts such as firing, brandishing, or trading a firearm, it would become virtually a dead letter in the context of many of the drug trafficking crimes to which it expressly applies. See 18 U.S.C. 924(c)(2). As the court below observed (J.A. 95 n.1), many such offenses, particularly those involving possession of drugs, "are furtive crimes" and "[s]tealth is essential to their success." J.A. 95 n.1. As a general matter, guns are used in violent crimes as instrumentalities of the offense—*e.g.*, the use of a gun to murder a suspected witness, see 18 U.S.C. 1512(a). But the firearms ordinarily play a

somewhat different role in drug trafficking offenses, and in particular in possessory drug offenses. Aside from the relatively rare "trading" cases, such as *Smith*, their ordinary role in such offenses is to facilitate the illicit venture by providing security to the dealer. To eliminate that use from the statute would severely limit its application to drug trafficking crimes.

1. Petitioners observe (Pet. Br. 15) that Section 924(c)(1) requires a mandatory consecutive term for any crime of violence or drug trafficking crime, including one "which provides for an enhanced punishment if committed *by the use of a deadly or dangerous weapon.*" 18 U.S.C. 924(c)(1) (emphasis added). They maintain that the italicized phrase "conveys the unmistakable suggestion of active employment," Pet. Br. 15, and that the same interpretation should be given to the term "use[]" as it appears in the basic statutory proscription of "use" "during and in relation to" a predicate offense.

The meaning of the phrase "by the use of a deadly or dangerous weapon" is not a reliable guide for determining the reach of the different phrase "uses during and in relation to," which is at issue in this case. The phrase "committed by the use of a deadly or dangerous weapon" may suggest an "active use" requirement because the words "committed by" may imply the use of the weapon as the means or instrumentality of committing the offense. By contrast, the basic statutory proscription of "us[ing] [a firearm] during and in relation to" the underlying offense naturally applies to conduct in which the firearm "facilitat[ed] or ha[d] the potential of facilitating" the offense. See *Smith*, 113 S. Ct. at 2059.[6] A firearm may

[6] Indeed, this Court has construed the phrase "in relation to" as a "deliberately expansive" phrase in both *Smith*, see 113 S. Ct. at 2058, and in other similar contexts. See *e.g.*, *District of Columbia* v. *Greater Washington Board of Trade*, 113 S. Ct. 580, 583 (1992). Contrary to petitioners' contention (Pet. Br. 40 n.22), nothing in *New York State Conference of Blue Cross &*

"facilitate" an offense by emboldening the defendant or protecting the drug operation, "whether or not * * * display or discharge in fact occurred." *Stewart*, 779 F.2d at 540.

The origins of the phrase "by the use of a deadly or dangerous weapon" explain why it does not bear on the issue in this case. The phrase was added in 1984 in response to this Court's holdings in *Simpson* v. *United States*, 435 U.S. 6 (1978), and *Busic* v. *United States*, 446 U.S. 398 (1980), that Section 924(c) is inapplicable when the underlying offense provided its own enhancement provision for use of a dangerous weapon in the commission of the offense. The 1984 amendment made clear that the mandatory consecutive sentence of Section 924(c) does apply to crimes such as armed bank robbery and assault on federal officers, in which an enhanced sentence is already authorized by statute for use of a dangerous weapon in the commission of the offense. See S. Rep. No. 225, 98th Cong., 1st Sess. 312-313 (1983). Both of the predicate crimes identified in the Senate Report as warranting the clarifying language in Section 924(c)(1) include explicit enhancement provisions for the use of a dangerous weapon in an assault. See 18 U.S.C. 2113(d) (enhanced penalty for assaulting or putting in jeopardy the life of any person "by the use of a dangerous weapon or device"); 18 U.S.C. 111(b) (enhancement for "[w]hoever, in the commission of [an assault on a federal officer], uses a deadly or dangerous weapon"). Thus, the "committed by" amendment was intended to refer to those other specific statutes; it does not, and was not intended to, track the basic prohibition of Section 924(c).

2. Petitioners also argue (Pet. Br. 15-18) that a construction of the term "uses" that embraces employment of a firearm to provide security to a defendant committing

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Blue Shield Plans v. *Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995), suggests to the contrary.

a drug trafficking offense "renders superfluous" the alternative way in which the statute can be violated—by "carry[ing]" a firearm. In their view, confining the term "use" to "active employment" of a firearm is necessary to provide an independent scope to "carry[ing]" liability. Cf. *United States Department of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2209-2210 & n.6 (1993) (noting canon of construction that each word of a statute must be given some effect).

Initially, virtually every example petitioners give (Pet. Br. 13, 15) to illustrate their understanding of the "active" use of a firearm—*e.g.*, firing, pointing, bludgeoning with, threatening, brandishing, displaying, and even trading a firearm—also ordinarily involves "carry[ing]" a firearm during and in relation to the predicate crime. Thus, even under petitioners' unduly narrow interpretation of the statute, the terms have a virtually complete overlap.[7]

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[7] Petitioners (Pet. Br. 18) and the dissenters below (J.A. 114-115) note that, in commenting on Section 924(c) in our brief in *McLaughlin* v. *United States*, 476 U.S. 16 (1986), we observed that "[i]t appears that Congress is of the view that something more than the carrying of a gun is required to establish its use." We also explained that Section 2113(d), which imposes additional penalties for bank robbery committed "by the use of a dangerous weapon or device," would not cover an armed robber who "approaches a bank teller and demands money without displaying a weapon, because "the robber has not 'used' the weapon to 'assault' anyone, as Section 2113(d) requires." See No. 85-5189 Gov't Br. at 19 n.18, citing S. Rep. No. 225, *supra*, at 314 n.10.

Neither of these observations, however, is inconsistent with our position in this case. Although, in the context of drug trafficking crimes, physical custody of a firearm may under some circumstances be sufficient to establish a violation of both the "uses" and "carries" prongs of the Section, the former offense requires not only proof of possession, but also that the firearm was being employed in some manner to facilitate commission of the predicate crime, such as by emboldening the defendant or furnishing protection to the trafficking operation. Our acknowledgement that under Section 2113(d) an actual assault with a dangerous weapon is

Moreover, in view of the manner in which Section 924(c)(1) evolved into its present form, the canon of construction that, in enacting a statute, "a legislature is presumed to have used no superfluous words," (*Platt* v. *Union Pac. R.R.*, 99 U.S. 48, 58 (1879)), loses much of its force. As we explain in greater detail below, see pp. 27-30, *infra*, Section 924(c) as originally enacted contained two distinct prohibitions. The first subsection prohibited "us[ing] a firearm *to commit any felony* which may be prosecuted in a court of the United States." The second subsection separately prohibited "carr[ying] a firearm *unlawfully during the commission of any felony* which may be prosecuted in a court of the United States." See 82 Stat. 1224 (emphasis added). Under that formulation, "use" and "carry" liability were fundamentally different from each other and from liability under the current statute. "Use" liability required proof that the gun was "use[d] to commit" the predicate offense. "Carry" liability required proof that the gun was "carried unlawfully"; the only required relationship to the predicate offense was temporal ("during").

In 1984, Section 924(c) was amended to delete the "unlawfully requirement (see 98 Stat. 2138-2139), to merge the two alternative ways in which the statute could be violated, and to add the "during and in relation to" element. That amendment divested the terms "uses" and "carries" of the qualifications ("to commit" and "unlawfully during") that gave them distinct connotations. Thenceforth, under either our construction or that of

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necessary has no bearing upon the connotation of the term "uses" as it appears in Section 924(c)(1). As explained, the former statute expressly requires that, in committing or attempting to commit a bank robbery, the defendant must "*assault*[] *any person, or put*[] *in jeopardy the life of any person* by the use of a dangerous weapon or device." 18 U.S.C. 2113(d) (emphasis added). No similar qualifying language applies to the "uses" prong of Section 924(c)(1).

petitioners, the terms "uses" and "carries" largely overlap. The convergence of the two terms, however, is a function of the statute's evolution. In light of that history, Congress's retention of both bases of liability is not a reason for imposing an artificially distinct and limited meaning on the term "uses," with the effect of narrowing the statute's coverage.[8]

3. Petitioners argue (Pet. Br. 19-21) that it is significant that 18 U.S.C. 924(d)(1) permits forfeiture both of weapons that are "used" and those that are "intended to be used." In their view, a firearm employed for security purposes—to protect the drugs or proceeds and to embolden the defendant—is a gun that is "intended to be used," but not one that is "used." Since Section 924(c)(1) prohibits the "use" of a firearm, petitioners argue that its employment for security is not covered. We agree that Section 924(c)(1) must be construed in light of the forfeiture provisions in Section 924(d), see *Smith*, 113 S. Ct. at 2056-2058, but petitioners' analysis of the forfeiture provisions is incorrect.

The forfeiture provisions of Section 924(d) reach both future uses of firearms during the course of ongoing offenses and intended uses of firearms in future offenses. For example, forfeiture under Section 924(d)(3)(C) applies to the use or intended use of firearms in the offense of shipping a firearm while engaged in the business of unlicensed dealing in firearms (18 U.S.C. 922(a)(1)),

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[8] Petitioners also urge (Pet. Br. 17) that it is unlikely that Congress would have intended a defendant to be punished with equal severity for both bearing a firearm on his person so that it is within his easy reach and for situating a firearm near drugs so that it is accessible from that location. To the contrary, there is no reason why Congress would have distinguished keeping a gun available on one's person for possible employment (carrying the firearm) and keeping it within reach for such a purpose (using the firearm). Both increase the possibility that a gun will be fired —and that someone will be injured or killed—in the course of the criminal offense.

transporting a firearm without a license (18 U.S.C. 922 (a)(3)), and selling a firearm to an unlicensed nonresident (18 U.S.C. 922(a)(5)). A firearm shipped, transported, or sold in violation of those provisions would be "used" in the commission of such an offense. But a firearm stockpiled by the offender while awaiting shipment, transportation, or sale during either an ongoing illicit firearms enterprise or a planned future enterprise would be one "intended to be used" in the commission of a future crime. See *United States* v. *One Assortment of Seven Firearms*, 632 F.2d 1276, 1278-1279 (5th Cir. 1980). The terms "used" and "intended to be used" thus apply to different classes of firearms. Congress therefore had reason to employ both terms in defining the classes of property subject to forfeiture.

In contrast, Section 924(c) requires actual (not future) commission of the predicate crime and actual (not future) use of the firearm in relation to that offense. For example, if a drug dealer purchased a firearm for the purpose of protecting his future drug operations, but was presently storing the firearm at a remote and inaccessible location, that firearm would be subject to forfeiture under Section 924(d), although it would not be the basis for a prosecution under Section 924(c). The inclusion of the phrase "intended to be used" in Section 924(d) therefore provides no basis for construing the term "use" in Section 924(c) to exclude employment of a firearm for security purposes.

C. The Legislative History Of Section 924(c) Lends No Support To Petitioners' Narrow Construction Of The Term "Uses"

As we have explained, the ordinary meaning of the term "uses" includes the employment of a firearm to protect a drug trafficking operation. Petitioners maintain (Pet. Br. 22) that, despite the breadth of that term, the legislative history of Section 924(c) demonstrates that

Congress intended it to apply only where a firearm is discharged, used to threaten someone, or offered as a medium of exchange. As the Court has repeatedly explained, however, "[a]bsent a clearly expressed legislative intention to the contrary, the words of the statute are conclusive." *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 28 (1989), quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1990). In such instances, the "'sole function of the courts is to enforce [the statute] according to its terms.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). In this case, "[n]othing in the legislative history of [Section 924(c)] militates against honoring the plain language of the [statute]. Nor is this one of the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Hallstrom*, 493 U.S. at 28, quoting *Ron Pair Enterprises, Inc.*, 489 U.S. at 242.

1. When it was originally enacted as part of the Gun Control Act of 1968, Section 924(c) imposed mandatory sentences on anyone who "(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States" or "(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States." The proposal that became Section 924(c) was introduced by Representative Poff as a floor amendment to H.R. 17735, then known as the Firearms Control Assistance Act of 1968. 114 Cong. Rec. 22,231 (1968); see *Simpson* v. *United States*, 435 U.S. at 13-14. In introducing his amendment, Representative Poff explained that the purpose of the mandatory minimum sentence it authorized was "to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail." 114 Cong. Rec. 22,231 (1968).

In making that statement, Representative Poff was not referring to the "carries" prong of the original Section 924(c). As originally enacted, the "carries" prong of the statute prohibited only the "unlawful" carrying of a firearm while committing an offense. The statute would thus not have applied to an individual who, for instance, had a permit for carrying a gun and carried it with him when committing an offense, and it would have had no force in "persuading" such an individual "to leave his gun at home." Instead, Representative Poff was referring to the "uses" prong of the original Section 924(c). His statement strongly suggests that the "uses" prong was intended to reach anyone who commits a federal felony and does not "leave his gun at home," *i.e.*, who arms himself for the purpose of committing a federal offense, regardless of whether he actually fires or brandishes the weapon or instead employs it in some other manner to facilitate the offense. Because Representative Poff was the sponsor of the legislation as ultimately enacted, "it is therefore reasonable to assume that [his remarks] represented the understanding of the Congressmen who voted for the proposal." *Busic* v. *United States*, 446 U.S. 398, 406 (1980).

Petitioners argue that, during the floor debates, other members of Congress made statements that are said to support an understanding that Section 924(c) required "active" employment of a firearm. Pet. Br. 24. Even if isolated statements of individual Members carried significant weight in interpreting the statute, the quoted statements would not support petitioners' conclusion. For example, Represenative Casey observed that, if the draft legislation omitted the term "carriers," it would "apply only to those who actually use a gun in the commission of the offenses enumerated." 114 Cong. Rec. 22,229-22,230 (1968). That statement is consistent with our position; "actual use" of a firearm to protect drugs or proceeds or to embolden the defendant is essential for conviction

under Section 924(c) under our view. In any event, Representative Casey's remarks were directed toward an amendment of his own that would have prohibited the "use" of a firearm "during the commission of any robbery, assault, murder, rape, burglary, kidnaping, or homicide (other than involuntary manslaughter)," and would thus not have included drug trafficking. 114 Cong. Rec. 22,229 (1968). Accordingly, his comment was addressed to the use of a gun in a crime of violence, and there was no reason to think that it illuminated the application of the statute as enacted to other crimes.[9]

2. a. As part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138-2139, Congress revised Section 924(c) in several respects. In particular, Congress substituted the phrase "crime of violence" for the term "felony" in order to include violent misdemeanors and to exclude non-violent felonies. See S. Rep. No. 225, 98th Cong., 2d Sess. 313 n.9 (1983). Additionally, as noted above, Congress merged the "uses" and "carries" prongs of the statute, deleted the requirements that the firearm be used "to commit" the offense or the weapon be carried "unlawfully," and imposed instead the "during and in relation to" requirement with respect to both "uses" and "carries" liability.[10] Congress's action suggests an expansive under-

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[9] Similarly, the remark of Representative Dowdy that "exhibiting [a gun] would be using the gun in the commission of a crime" (114 Cong. Rec. 22,235) and the comment of Representative Harsha that the legislation required "actual use" of a firearm (114 Cong. Rec. 22,234) do not support petitioners' position and in any event were made in connection with the rejected Casey amendment.

[10] The 1984 amendment to Section 924(c) read in pertinent part as follows:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in

standing of "uses" liability, including all "uses" that coincide with and relate to the predicate crime, even if they are not the direct means of its commission.

The 1984 amendment also made clear that Section 924(c)'s mandatory minimum sentence applied to any crime of violence, including crimes carrying their own enhanced punishment if committed by means of a dangerous weapon, and was to be served before the sentence for the underlying offense. In a footnote immediately following its explanation of the enhanced sentencing provision, the Committee Report observed:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape. The requirement in the present section 924(c) that the gun be carried unlawfully, a fact usually proven by showing that the defendant was in violation of a State or local law, has been eliminated as unnecessary. * * * Moreover, the requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

S. Rep. No. 225, *supra*, at 314 n.10. Petitioners maintain (Pet. Br. 27) that part of the first sentence of the footnote ("if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape") "strongly suggests that Congress believed that 'use' of a firearm consists of actions such as firing, displaying, or referring to the weapons during the predicate offense."

addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

The language on which petitioners rely does not support their argument. It discusses only the scope of liability under the "carries" prong of the statute; it does not purport to explain or comment on the scope of the term "uses." In fact, the only portion of the footnote that addresses the term "uses" is the final sentence, which states that liability would be inappropriate "in a situation where [the gun's] presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight." The clear import of that statement is that Congress contemplated that the amended statute would apply when firearms "played [a] part in the crime," by being used to protect or to embolden the defendant. See *United States* v. *Phelps*, 895 F.2d 1281, 1283-1284 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc).

Finally, petitioners argue (Pet. Br. 29) that the Report's specific mention of particular uses of guns means that the statute as enacted was limited to those uses.[11] The amended statute, however, applied only to crimes of violence, and it was therefore to be expected that the examples given in the Report would be of typical uses of a gun in such crimes. Moreover, the examples given were not intended to be generally representative of the application of the statute. Rather, they were offered to explain the operation of the new provision requiring consecutive sentences to those that would be imposed under a burglary statute. See S. Rep. No. 225, *supra*, at 313-314. In any event, the only theory on which this passage could conceivably be relevant to interpretation of the

[11] Petitioners refer (Pet. Br. 29) to the Report's statement that "[f]or example, a person convicted of armed bank robbery in violation of section 2113(a) and of using a gun in its commission (for example by pointing it at a teller or otherwise displaying it whether or not it is fired) would have to serve five years * * * before his sentence for the conviction under section 2113(a) and (d) could start to run." S. Rep. No. 225, *supra*, at 313-314.

present version of Section 924(c) has long been discredited. As this Court has repeatedly explained, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Stebben*, 488 U.S. 105, 115 (1988); see, *e.g.*, *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980); *Standefer* v. *United States*, 447 U.S. 10, 20 n.12 (1980). Indeed, that principle underlay this Court's decision in *Smith*; the fact that the legislative history contained no reference to the use of guns in barter transactions and that the Congress that originally enacted the statute had more paradigmatic uses of guns expressly in mind were rejected as bases to limit the scope of the statute. See 113 S. Ct. at 2058. The same result follows *a fortiori* here.

b. The construction of the 1984 amendments must also be informed by the principle that when Congress reenacts legislation that has been subject to a "settled judicial construction," the courts will "apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them." *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993) (collecting cases); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975). By 1984, the term "uses" in Section 924(c) had been uniformly construed to embrace any employment of a firearm to facilitate the commission of a federal felony, including the sorts of uses for protection that are at issue in this case.[12]

For example, in *United States* v. *Grant*, 545 F.2d 1309, 1312-1313 (2d Cir. 1976), cert. denied, 429 U.S.

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[12] See, *e.g.*, *United States* v. *LaGuardia*, 774 F.2d 317, 321 (8th Cir. 1985) ("use" of a firearm includes employment to protect drugs and proceeds); *United States* v. *Mason*, 658 F.2d 1263, 1270-1271 (9th Cir. 1981) (Kennedy, J.) (affirming Section 924(c) conviction although gun "was holstered and * * * never brandished or displayed").

1103 (1977), the Second Circuit rejected the defendant's claim that he could not be convicted for "using" a number of guns that were found alongside drugs. The court held that "the evidence"—which consisted of the juxtaposition of weapons and drugs—"established that [the defendant] used the guns as part of a tight security operation to protect large quantities of cocaine and hence to commit the felony of possessing cocaine with intent to distribute it." 545 F.2d at 1312. Similarly, in a non-drug context in *United States* v. *Moore*, 580 F.2d 360, (9th Cir. 1978), cert. denied, 439 U.S. 970 (1979), a defendant who had a gun concealed in the waistband of his trousers was arrested on his way to rob a bank. *Id.* at 362. The Ninth Circuit affirmed his conviction for "us[ing]" a firearm in violation of Section 924(c), holding that "[t]he fact that [the defendant] never had an opportunity to brandish or discharge his gun does not mean that he did not 'use' it." The Ninth Circuit explained that the gun could form the basis of "using" liability, because the gun, like the gloves and ski mask he was wearing, "increased the likelihood of success; without them he probably would not have sallied forth." 580 F.2d at 362.

Neither in 1984, when Congress first significantly amended the language of Section 924(c), nor in 1986 and 1988, when Congress again amended the statute, did Congress give any indication that it "disagreed" with the results or reasoning in those cases. See *Reno* v. *Koray*, 115 S. Ct. 2021, 2026 (1995). To the contrary, by replacing the pre-1984 "uses to commit" standard with the "uses during and in relation to" provision, Congress indicated that it wanted a broader, not narrower basis for "uses" liability under the statute. Petitioners' suggestion that Congress intended somehow to narrow the scope of the term "uses"—and to reject the consistent views of the courts of appeals—is unfounded.

3. In 1986, as part of the Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 104, 100 Stat.

457, Congress further amended Section 924(c)(1), *inter alia*, by inserting the phrase "or drug trafficking crime" after the phrase "crime of violence." See 100 Stat. 457. The House Judiciary Committee's report on FOPA explained that a principal purpose of the legislation was to "[p]rovide an important new weapon against narcotics traffickers" and to "protect[] * * * law enforcement officers from the proliferation of machine guns and high-powered 'assault-type' weapons that are increasingly being used by criminals." H.R. Rep. No. 495, 99th Cong., 2d Sess. 2, 7 (1986).

Despite that broad expression of purpose, petitioners contend (Pet. Br. 30-31) that a portion of the House Report, rejecting a self-defense provision that had been included in another version of the legislation, suggests that Congress did not intend the term "uses" to embrace employing a firearm for protection. In view of Congress's rejection of the self-defense provision and the well-recognized hazards of looking to the views of a subsequent Congress to interpret a previously enacted term, see, *e.g.*, *United States* v. *Price*, 361 U.S. 304, 313 (1960), the House Report is a weak basis for construing the term "uses." In any event, the passage on which petitioners rely does not support their argument.

The Report states that a defendant generally may not rely on a self-defense claim where the defendant was protecting himself from a danger caused by his commission of the crime. The report then comments that this limitation "may rule out a successful self-defense claim in most situations in which the *use* branch of the offense forms the basis of the" Section 924(c) liability. H.R. Rep. No. 495, *supra*, at 10. It further observes (*ibid.*) that, if the proposed defense were adopted:

> the "carrying" branch of the offense might be decimated, in that the felon could claim that he was only carrying the weapon for defense, and cite the fact that he did not actually *use* the weapon as proof of his claim. For example, a drug trafficker, if charged with carrying a firearm under 18 U.S.C. 924(c) in connection with drug trafficking, might be able to reasonably sustain a claim that it was carried for protection against rival traffickers.

The purpose of that passage was to address a proposed self-defense amendment to the statute, not to define the contours of the term "uses." The reference to the unavailability of the self-defense exception in "most" situations involving the "use" prong of the statute is entirely accurate, under any reading of the statute: a defendant who places a gun next to drugs or proceeds for protection of his criminal enterprise surely cannot claim that he was using it for self-defense, just as—in the Committee's terms—"a felon who *uses* a gun in the commission of a felony or in a shoot out with police while fleeing cannot * * * claim self-defense." Nor can petitioners derive support from the Report's guarded observation that, under the proposed defense, a defendant who "did not actually *use*" a weapon he was carrying "*might* reasonably be able to sustain the claim that it was carried for protection against rival traffickers" (second emphasis added). In context, it is clear that the Committee intended the term "actually use" to refer to the firing or discharge of the weapon; yet neither the dissenting opinion below nor petitioners would argue that the term "use" is limited to instances where a weapon is fired.

4. As part of the Anti-Drug Abuse Act of 1988, Congress further amended Section 924(c). On that occasion, Congress added a new paragraph providing that "[f]or purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*)." See Pub. L. 100-690 § 6212, 102 Stat. 4360. The amendment not only confirmed—as petitioners concede—that Congress in-

tended the prohibition against using a firearm during and in relation to a drug trafficking offense to include so-called "passive crimes such as possession with intent to distribute" (Pet. Br. 32), but also that it intended "use" of a firearm under Section 924(c)(1) to embrace the employment of a firearm for security as well.

In the context of possession with intent to distribute and similar offenses, the typical use of a firearm is provide security for the operation. Consequently, a construction of the term "uses" that excludes that employment of a firearm would nullify the application of Section 924(c)(1) to many offenses expressly brought within it by the 1988 amendment. But as this Court has observed:

> [such a] restrictive reading of the phrase "uses . . . a firearm" does violence not only to the language and structure of the statute, but to its purpose as well. When Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination.

Smith, 113 S. Ct. at 2060. As in *Smith*, in view of that understanding, "we * * * see no reason why Congress would have intended courts and juries applying § 924(c)(1) to draw a fine metaphysical distinction." *Ibid.* Regardless whether the gun is drawn, brandished, and fired, or whether it is instead carefully placed to protect the drugs or proceeds and to embolden the defendant, "it creates a grave possibility of violence and death in either capacity." *Ibid.*

D. The Rule Of Lenity Has No Application In This Case

Petitioners contend (Pet. Br. 32) that their narrow construction of the term "uses" in Section 924(c)(1) is at least reasonable and that the statute is therefore ambiguous. Consequently, they maintain, the rule of lenity dictates that the ambiguity be resolved in their favor.

"The mere possibility of articulating a narrow construction [for Section 924(c)(1)], however, does not by itself make the rule of lenity applicable." *Smith*, 113 S. Ct. at 2059. As the Court explained in *Moskal* v. *United States*, 498 U.S. 103, 108 (1990), "because the meaning of language is inherently contextual, [the Court has] declined to deem a statute 'ambiguous' for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the government." Instead, the rule of lenity comes into play only when, after "[a]pplying well established principles of statutory construction," *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991), there is still a "grievous ambiguity or uncertainty in the language and structure of the Act." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991). See *Smith*, 113 S. Ct. at 2059, quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (the "rule [of lenity] is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute") (internal quotation marks omitted).

This is not such a case. The "common usage and dictionary definitions of the terms 'uses . . . a firearm,'" *Smith*, 113 S. Ct. at 2060, embrace any employment of a firearm that facilitates a drug trafficking offense, including the use of a firearm to provide security for the venture. Moreover, Congress's design was to impose heightened sanctions when a defendant employs the "dangerous combination" of firearms and narcotics trafficking. *Ibid.* That intention is inconsistent with an interpretation of the statute that singles out particular uses of guns while leaving others unpunished. Whether a gun is overtly deployed or is covertly used to embolden a defendant to commit an offense, the presence of the firearm presents precisely the "grave possibility of violence and death," *ibid.*, that Congress sought to prevent in enacting and subsequently amending Section 924(c)(1).

III. A JURY MAY INFER THE USE OF A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING OFFENSE BASED ON ITS PROXIMITY TO THE DRUGS OR PROCEEDS AND ITS ACCESSIBILITY TO THE DEFENDANT

Petitioners argue (Pet. Br. 35-47), in the alternative, that if the "active use" gloss they place on the statute is rejected, this Court should require a multi-factor analysis to determine whether the evidence is sufficient to support a conviction under Section 924(c). In petitioners' view (Pet. Br. 41-44), the court of appeals adopted too narrow a test when it held that the evidence is sufficient to support a conviction under Section 924(c)(1) if it shows that the defendant maintained a firearm proximate to and accessible from drugs or drug proceeds.

The court of appeals' test, rather than petitioners' approach, properly respects the role of the reviewing court to "give[] full play to the responsibility of the trier of fact fairly * * * to draw reasonable inferences from basic facts to ultimate facts." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The prosecution is not "under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt." *Id.* at 326. As this Court has explained, the "jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference." *Tot* v. *United States*, 319 U.S. 463, 467 (1943). When the gun is found proximate to drugs or proceeds and is accessible to the defendant from that location, "reason and experience," *ibid.*, support the inference that it is being employed to facilitate the offense by protecting and emboldening the defendant. Since that is a "use" of the gun "during and in relation to a drug trafficking crime" under Section 924(c)(1), evidence that shows such proximity and accessibility is sufficient.

1. The fact pattern presented by these cases is a common one. The evidence established that the firearm was actually or constructively possessed or controlled by the

defendant [13] and that "the firearm in question was in proximity to the drugs, drug paraphernalia, or drug proceeds and was accessible to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug trafficking offense." J.A. 101. In that situation, the court of appeals made clear that there is sufficient evidence to support a Section 924(c)(1) conviction. That conclusion is widely shared in the courts of appeals.[14]

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[13] See, *e.g.*, *United States* v. *Torres-Maldonado*, 14 F.3d 95, 102 (1st Cir.), cert. denied, 115 S. Ct. 193 (1994); *United States* v. *Mathews*, 942 F.2d 779, 783-784 (10th Cir. 1991); *United States* v. *Long*, 905 F.2d 1572, 1576-1578 (D.C. Cir.) (Thomas, J.), cert. denied, 489 U.S. 948 (1990).

[14] See, *e.g.*, *United States* v. *Nieves-Burgos*, No. 94-1370 (1st Cir. July 13, 1995), slip op. 20-21 ("analysis is focussed 'solely on the proximity of the gun to the drugs and the accessibility of the gun to the defendant' "); *United States* v. *Paz*, 927 F.2d 176, 179 (4th Cir. 1991) ("the gun was present and accessible * * * and there is little question that its presence would help facilitate the success of the criminal undertaking"); *United States* v. *Wilson*, 27 F.3d 1126, 1133 (6th Cir.) ("It was within the province of the jury for them to conclude that the * * * rifle was there to protect the * * * cocaine."), cert. denied, 115 S. Ct. 452 (1994); *United States* v. *Woods*, 995 F.2d 713, 718 (7th Cir. 1993) ("Dealers who keep guns 'in strategic proximity' to their drugs or transactions 'use them in relation to' their drug trafficking for purposes of the statute."); *United States* v. *Young-Bey*, 893 F.2d 178, 181 (8th Cir. 1990) ("It is sufficient to show that the defendant kept the firearms readily accessible to protect and facilitate the drug enterprise."); *United States* v. *Baker*, 30 F.3d 1278, 1279-1280 & n.1 (10th Cir.) (evidence sufficient to infer use where there is "evidence the firearm was available to the defendant in the vicinity where the drug trafficking offense took place"), cert. denied, 115 S. Ct. 273 (1994); *United States* v. *Poole*, 878 F.2d 1389, 1393 (11th Cir. 1989) ("the presence of weapons in a location defendant used to distribute a significant quantity of illegal drugs is sufficient to submit to the jury the issue of whether defendant used the firearms in connection with a drug trafficking crime"). The First Circuit has granted en banc rehearing on this issue, among others, in *United States* v. *Ramirez-Ferrer*, Nos. 94-1016, 94-1017, 94-1018 (1st Cir. June 28, 1995).

When firearms are found proximate to drugs or proceeds and accessible to the defendant, the inference that the defendant used the guns to provide security for his drug offense is supported by the "well-recognized nexus between drugs and firearms." *United States* v. *Golter*, 880 F.2d 91, 94 (8th Cir. 1989). As courts have observed, firearms are "tools of the drug trafficking trade." *United States* v. *Gahagan*, 865 F.2d 1490, 1499 (6th Cir.), cert. denied, 492 U.S. 918 (1989); see *United States* v. *Brockington*, 849 F.2d 872, 876 (4th Cir. 1988) (noting "common sense recognition that drug dealing is a dangerous and often violent enterprise"); *United States* v. *Grant*, 545 F.2d 1309, 1313 (2d Cir. 1976) (taking judicial notice that "substantial dealers in narcotics keep firearms on their premises as tools of the trade"), cert. denied, 429 U.S. 1103 (1977); *United States* v. *Wiener*, 534 F.2d 15, 18 (2d Cir.), cert. denied, 429 U.S. 820 (1976) (noting that large scale drug dealers typically keep firearms at their base of operations as a tool of the trade). Empirical studies of the issue confirm that firearms have proliferated in the narcotics trade.[15] At trial in these cases, that point was also underscored by expert testimony.[16]

[15] See, *e.g.*, A. Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, H. John Heinz III School of Public Policy and Management, Carnegie Mellon Univ. Working Paper Series 18 (1994) ("juveniles, as all participants in the illicit drug industry, are very likely to carry guns for self-protection, largely because that industry uses guns as an important instrument for dispute resolution"); Sheley, *Drug Activity and Firearms Possession and Use By Juveniles*, 24 Journal of Drug Issues 363, 373 (1994) (90% of the drug dealers in the surveyed population owned a firearm and 83% of those who had sold drugs had fired a gun at someone).

[16] In both *Bailey* and *Robinson*, experienced narcotics detectives testified that narcotics dealers commonly employ firearms in order to protect themselves, their wares, the proceeds of their drug dealing, or the narcotics operation itself against rival drug gangs or the police. In some instances, they also employ firearms for "enforcement purposes." J.A. 10; *Robinson* Tr. 77-79. In *Bailey*, the testifying detective added that narcotics dealers not only conceal firearms on their persons, but also frequently, "if it's a stash house where they store their drugs and cash," keep weapons "within the[ir] premises." J.A. 11.

It is true that a gun's proximity and accessibility to drugs or proceeds does not *invariably* mean that the gun was "used" in relation to the drug trafficking offense. For example, the defendant may offer evidence that "he possessed the gun solely for a different purpose—for example as part of a collection of guns that just happened to be kept in a place that later became involved in drug trafficking." J.A. 99. If so, the gun would have been coincidentally located near the drug trafficking operation, but would not have been "use[d] * * * in relation to a drug trafficking crime." But whether such an explanation should be accepted turns on the credibility of the witnesses and the force of the evidentiary presentation. Those are matters for the jury to determine—not the reviewing court. Thus, where there is sufficient evidence of proximity and accessibility, the jury may infer the "use" of the gun. If it does so, the resulting conviction is sufficiently supported by the evidence.[17]

An appellate court applying a proximity and accessibility standard must still, of course, review the evidence for sufficiency. In *United States* v. *Theodoropoulos*, 866

[17] Petitioners (Pet. Br. 17) and Judge Wald's dissent (J.A. 103-104) argue that, under the court of appeals' standard, the gun need not be shown to be accessible to the defendant. The court of appeals, however, specifically held that one "uses" a gun "whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime." J.A. 95. Because the crime of possession with intent to distribute narcotics is a continuing offense, it is sufficient that the gun be "accessible to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds," J.A. 101, at some point during the possession. Thus, the court of appeals' test requires accessibility to the defendant at some point during the commission of the crime—although not necessarily at the moment when the defendant is arrested.

F.2d 587 (3d Cir. 1989), for example, the Third Circuit held that a loaded shotgun located inside an apartment and accessible to drug traffickers operating at that location constituted evidence that the weapon was "used" during and in relation to a drug trafficking conspiracy. *Id.* at 597. The court also held, however, that three other firearms concealed in a trash can on a porch outside the building did not satisfy the requirement of proximity and accessibility. *Id.* at 597. Where, as in that case, no other basis for inferring "use" has been established, a reviewing court must find the evidence insufficient to support a conviction under Section 924(c).

2. Petitioners urge (Pet. Br. 44-47) that a five-factor balancing test be used to test the sufficiency of the evidence in Section 924(c) cases. Factor (1) is accessibility, which respondents concede "lends some support to an inference that the gun provided protection for the drug offense or that the defendant derived some service from the gun." Pet. Br. 45. Petitioners' other factors are (2) "proof of an earlier drug transaction at which the firearm was actively employed or available to protect the drug operations," (3) "the type, condition, and number of firearms involved," (4) "whether the firearm was loaded and ready to fire," and (5) "whether expert testimony bolstered the government's theory of 'use.'" Pet. Br. 45-46.

Evidence relating to petitioners' factors (2)-(5) may in some cases have probative value to the jury in considering whether to infer "use" under Section 924(c). Those factors may also in some cases be sufficient to support submission of a case to the jury even when the proximity and accessibility tests are not satisfied. None of them need be present, however, to support the jury's inference of "use" under Section 924(c).

For example, proof of possession with intent to distribute under 21 U.S.C. 841(a)(1) does not require proof of a drug transaction. Yet it is clear that Congress

intended use of a gun during and in relation to that offense to constitute a violation of Section 924(c); clarifying that Section 924(c) covered such offenses was the primary purpose of the 1988 amendment to the statute. See 114 Cong. Rec. 32,965 (1986) (prior statute "does not cover * * * possession with intent to distribute," but "amendment makes clear that section[] 924(c) * * * cover[s] *all* drug offenses") (emphasis added). To require proof of a drug transaction in a Section 924(c)(1) prosecution based on possession with intent to distribute would effectively undo Congress's 1988 amendment to the statute. Even where distribution, and not mere possession, is charged, a gun can facilitate a dealer's distribution by protecting his "stash," even if the gun is not itself brought to the site of a drug transaction.

Similarly, the type, number, and condition of the firearms, as well as whether they were loaded when they were found, may be probative in jury argument, but is not essential in order to submit a case to the jury. As petitioners agree, "the 'use' of a single weapon violates the statute." Pet. Br. 46. Even an unloaded, small weapon can quickly be converted into an instrument of violence, and it can be used to threaten policemen or others—possibly prompting dangerous responses—and thus to provide security for the commission of the drug offense.[18] Finally, although expert testimony may be useful in particular cases, it is not required in a Section 924(c) offense. To return a conviction, the jury must infer that the defendant placed a gun proximate to drugs or proceeds and

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[18] See, *e.g.*, *United States* v. *Hill*, 967 F.2d 902, 905-907 (3d Cir. 1992) (unloaded, disassembled, concealed rifle); *United States* v. *Moore*, 919 F.2d 1471, 1476 (10th Cir. 1990) (defective machine gun); *United States* v. *Coburn*, 876 F.2d 372, 375 (5th Cir. 1989) ("[t]he fact that a firearm is 'unloaded' or 'inoperable,' does not insulate the defendant from the reach of section 924(c)"); *United States* v. *York*, 830 F.2d 885, 891 (8th Cir. 1987) (lack of firing pin and defective cylinder), cert. denied, 484 U.S. 1074 (1988).

accessible to them to facilitate his drug trafficking offense. That is a common-sense inference, of a type that is ordinarily well within the province of a jury.

3. Applying the correct standard, the evidence in these cases was sufficient to support the convictions under Section 924(c). Bailey was arrested in a car that served as a mobile operation for the distribution of cocaine. Located adjacent to some of the cash proceeds in the trunk was a loaded nine millimeter Smith and Wesson pistol. The jury could infer from the proximity of the pistol to the money, and the accessibility of it to Bailey when he handled the funds, that the pistol was used to provide protection and security to his drug trafficking. Likewise, Robinson's .22 Derringer pistol was found, in her apartment, in a trunk that also contained marked money representing the proceeds of a drug deal as well as two plastic baggies containing cocaine. Robinson had been observed retrieving cocaine from the bedroom where the trunk was located the previous day. The jury could infer from the location of the pistol in a place where petitioner went to obtain drugs that the pistol provided protection and security to her in her distribution of cocaine. Accordingly, the court of appeals correctly affirmed the jury's finding in each case of a violation of Section 924(c)(1).[19]

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[19] Because the en banc majority did not consider liability under the "carries" prong of Section 924(c)(1), if the Court does not agree with our submission in this case, the appropriate disposition would be to remand to the court of appeals for consideration of that basis for upholding the convictions.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Section 924(c)(1), 18 U.S.C., provides, in relevant part, as follows:

> (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years[.] * * * Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.
>
> (2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).